General Counsel's Supplemental Report
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Public Employment Relations Commission

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APPEALS FROM COMMISSION CASES

Representation

In *City of Newark v. Newark Council 21, Newark Chapter, NJCSA*, App. Div. Dkt. No. A-2380-97T5 and A-2960-97T5 (3/26/99) (to be published), the Appellate Division affirmed a ruling by the Director of Representation refusing to place civilian employees in the same negotiations unit as police officers. An arbitrator had ruled that the City of Newark, consistent with a federal grant, could replace police officers with civilian employees to perform clerical tasks; but the civilian employees had to be placed in the same negotiations unit as the police officers. The City then filed a clarification of unit petition seeking to accomplish that end. The Director, however, held that the award was repugnant to the Employer-Employee Relations Act because it violated section 5.3's prohibition against police officers belonging to the same union as civilian employees. D.R. No. 98-9, 24 *NJPER* 36 (¶29022 1998). The Court affirmed this ruling. The Court also vacated the rest of the award since it believed the underlying civilianization dispute was non-negotiable given *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 558 (1998).

Scope of Negotiations

In *Ridgefield Ed. Ass'n v. PERC*, App. Div. Dkt. No. A-4710-97T2 (3/30/99), the Court transferred a dispute concerning the applicability of *N.J.S.A.* 34:13A-29 to the Commission. The Association alleged that a letter from a principal to an Association official was a reprimand and therefore binding arbitration could be invoked under *N.J.S.A.* 34:13A-29. The Court held that this question was within the Commission's primary jurisdiction under *N.J.S.A.* 34:13A-5.4(d). A

secondary question was whether the Director of Arbitration properly declined to appoint an arbitrator since the parties had not agreed to use PERC's arbitration panel. The Court suggested that, absent an agreement to use PERC's panel, *N.J.S.A.* 2A:24-5 was the proper mechanism for securing an arbitrator to hear a disciplinary dispute under *N.J.S.A.* 34:13A-29.

Statutes

The Employer-Employee Relations Act has been supplemented by a new provision, *N.J.S.A.* 34:13A-30. Under 29 *U.S.C.* §504, persons convicted of certain crimes are disqualified from serving in the following capacities in the private sector: as an adviser, official, representative, or employee of a labor organization; as an adviser to an employer; as an official or employee of an employee organization; in a position with an employer involving collective bargaining or labor-management relations; in a position permitting the individual to receive a share in the proceeds from sales to a labor organization; as an official of any provider of goods or services to a labor organization; or in any position involving authority over funds or property of a labor organization. *N.J.S.A.* 34:13A-30 extends these prohibitions to persons and activities in the New Jersey public sector. This provision, however, does not specify the forum for applying or enforcing its prohibitions.

The Governor has signed a bill, A-2839, permitting a collective negotiations agreement to specify the amount a local government employer will pay to provide retirement benefits under the State Health Benefits Program to employees in that negotiations unit and their dependents. A similar bill covering State employees was recently enacted. *N.J.S.A.* 52:14-17.28b. The bill also conforms the age and service eligibility requirements for employer payments for SHBP coverage to the age and service eligibility requirements for employer payments for non-SHBP health insurance coverage under *N.J.S.A.* 40A:10-23. School boards are not included among the local governments that can negotiate over payments for SHBP coverage for retirees.

The Governor has also signed a bill, AJR-49, establishing a "Public Officers Salary Review Commission." The Commission will recommend changes in salaries for the Governor, cabinet officers, the Legislature, Supreme and Superior Court judges, workers' compensation judges, administrative law

judges, county prosecutors, and members of the Board of Public Utilities, the SCI, and the Casino Control Commission.

OTHER COURT CASES

Grievance Arbitration

1. Decisions Confirming Awards

An Appellate Division panel has confirmed an award reinstating a custodian whose contract was not renewed after 20 years of poor work. *Essex Cty. Voc. Bd. of Ed. v. Essex Cty. Voc. Ed. Ass'n*, App. Div. Dkt. No. A-2871-97T1 (1/26/99), pet. for certif. pending. Applying a clause protecting custodians against non-renewals without just cause, the arbitrator and the Court held that the custodian was entitled to some measure of progressive discipline, such as a warning or an increment withholding, before his employment was ended.

2. Other Arbitration Decisions

In *Wayne Tp. Bd. of Ed. v. Wayne Ed. Ass'n*, App. Div. Dkt. No. A-2749-97T5 (1/19/99), an Appellate Division panel held that two grievances were not contractually arbitrable. The grievances contested the non-renewals of the employment contracts of a custodian and a bus driver. The Court rejected an argument that a clause prohibiting discipline without just cause limited the employer's discretion not to renew the contracts. The Court also appears to believe that, absent contractual tenure, non-renewals are not disciplinary under *N.J.S.A.* 34:13A-29. *Accord Hanover Tp. Bd. of Ed.*, P.E.R.C. No. 99-7, 24 *NJPER* 413 (¶29191 1998), app. pending App. Div. Dkt. No. A-000306-98T2. Along with *Marlboro Tp. Bd. of Ed. v. Marlboro Tp. Ed. Ass'n*, 299 *N.J. Super*. 283 (App. Div. 1997), certif. den. 151 *N.J.* 71(1997), *Wayne* appears to put the burden on majority representatives to negotiate explicit contractual tenure clauses for non-professional employees in order to contest non-renewals.

An Appellate Division panel has dismissed a complaint in which retired corrections officers sought payment for unused sick leave days at the rate of one day's pay for each unused day. *Rutledge v. Essex Cty.*, App. Div. Dkt. No. A-3334-97T2 (2/8/99). Different majority representatives represent corrections officers at different County jails so the Court ruled that an arbitration award giving such relief to corrections officers at the West Caldwell jail was not res judicata in this case involving officers of the Newark jail. The Court also held that the retirees could not sue

without first filing and arbitrating grievances under their collective negotiations agreement. Finally, the Court suggests that the retirees may be able to pursue an unfair practice charge if the County misled them about the necessity of filing grievances.

In *Demarest Bd. of Ed. and Demarest Ed. Ass'n*, P.E.R.C. No. 99-36, 24 *NJPER* 514 (¶29239 1998), app. pending App. Div. Dkt. No. A-2001-98T5, arbitration of an increment withholding was stayed pending appeal.

CEPA Cases

In *Cedeno v. Montclair State Univ.*, App. Div. Dkt. No. A-4389-97T3 and A-4393-97T3 (3/9/99) (to be published), a split Appellate Division panel held that a person who is statutorily disqualified from obtaining or keeping public employment as a result of a criminal conviction may not maintain an action asserting that his discharge violated CEPA or the Law Against Discrimination. The plaintiff was fired from his job as Director of Purchasing at Montclair State University. He filed a lawsuit alleging CEPA and LAD claims, but during discovery the employer learned that he had been convicted of bribery 20 years ago. The majority holds that the prior conviction terminated the plaintiff's right to maintain his lawsuit or obtain any relief. Dissenting Judge Lesemann would have permitted plaintiff to maintain the lawsuit and perhaps to recover back pay, but not to be reinstated or receive front pay.

Discipline Cases

In *Hammond v. Monmouth Cty. Sheriff's Dept.*, 317 *N.J. Super*. 199 (App. Div. 1999), the Court affirmed a Merit System Board decision dismissing disciplinary charges against a County corrections officer. On appeal, the employer argued that the ALJ and the MSB erred in not allowing the employer to relitigate two disciplinary charges that had been dismissed after a departmental hearing. Judge Kestin's opinion disagreed, concluding that it is the employee, not the appointing authority, that has the right to appeal to the MSB and that entitling the appointing authority to broaden the charges on appeal "violates any decent sense of due process or fair play." *Id*. at 206.

Salary Guide Placement

In *Warren Cty. Vocational-Technical School Ed. Ass'n v. Warren Cty. Vocational-Technical School Bd. of Ed.*, App.Div. Dkt. No. A-3081-97T2 (3/4/99) (to

be published), a teacher whose position had been abolished when he was at the top step of the salary guide was reinstated seven years later at the top step of the guide. The teacher sought payment of off-guide increases during the intervening years, claiming he was entitled to them pursuant to the parties' contract, an advisory arbitration award, and *N.J.S.A.* 18A:28-12. The Court rejected these claims, finding no contractual basis for such payments and no warrant for extending the seniority protections of *N.J.S.A.* 18A:28-12 to this context.

O'Donnell v. Hanover Tp. Bd. of Ed, App. Div. Dkt. No. A-417-97T2 (12/18/98) dismissed a teacher's education law petition seeking salary guide credit for her supplemental teaching experience within the district. The employer did not credit the teacher for that experience when she was hired in 1984, but did give such credit to part-time supplemental teachers when they were converted to full-time teachers in 1993. The Court rejected a claim that this disparity was arbitrary and a denial of equal protection. The teacher was not protected by a collective negotiations agreement entitling her to supplemental teaching credit and *N.J.S.A.* 18A:29-9 vests a district with "the greatest possible flexibility in meeting its staffing needs in light of current economic and market conditions."

Privatization

The Appellate Division has dismissed an appeal challenging a contract between the State and a private sector company to operate the motor vehicle inspection program. *CWA v. DiEleuterio,* App. Div. Dkt. No. A-7073-97T3 (1/15/99). The appeal was held to be moot since the Court had earlier denied a request to stay the contract and since discontinuing the contract at this juncture would jeopardize meeting a Federal Clean Air Act deadline and thus continuing to receive federal funding.

Police Departments

In *PBA, North Brunswick, Local 160 v. North Brunswick Tp.*, App. Div. Dkt. No. A-246-97T2 (3/4/99) (to be published), an Appellate Division panel held that *N.J.S.A.* 40A:14-118 permits a township to appoint a Director of Police (rather than a police chief) and to have the Director both promulgate departmental rules and oversee daily operations. The PBA had argued that such an appointment miscombined legislative and executive functions.

Entire Controversy

An employee who persuaded the Merit System Board to reduce a termination to a 10-day suspension was not precluded from filing a new LAD claim in court contesting the suspension. *Long v. Lewis*, App. Div. Dkt. No. A-4080-97T3 (2/23/99) (to be published). The Court relies on *Thornton v. Potamkin Chevrolet*, 94 *N.J.* 1 (1983), holding that the entire controversy doctrine does not block administrative or court adjudications of discrimination claims following grievance determinations.

Mid-Contract Bargaining

In *National Federation of Federal Employees v. Department of Interior*, __ U.S. __, 119 *S.Ct.* 1003, 160 *LRRM* 2577 (1999), the United States Supreme Court concluded that the statutory duty to bargain under the Federal Service Labor-Management Relations statute, 5 *U.S.C.* §7101 *et seq.*, neither compels nor prohibits mid-contract bargaining. Defining the existence and extent of any mid-contract bargaining obligation involving federal agencies is a matter committed to the expertise of the Federal Labor Relations Authority.

Residency Requirements

In *Newark Council No. 21, NJCSA v. James*, 318 *N.J. Super*. 208 (App. Div. 1999), an Appellate Division panel permitted Newark to enforce a residency requirement. While the City may have enforced the ordinance laxly, it had not engaged in a studied policy of non-enforcement.

Disability Payments

In Brown v. Old Bridge Tp., App. Div. Dkt. No. A-0522-97T2 (3/19/99) (to be published), an Appellate Division panel rejected a police officer's claim for long-term disability payments exceeding his salary at the time he was shot in the line of duty. The Court held that *N.J.S.A.* 40A:14-154 preempted enforcement of a contractual provision that would have resulted in the officer receiving a greater amount; the statute overrode a judicially-enforced arbitration award involving a different employee; and the statute was not unconstitutional. *See also Old Bridge Tp.*, P.E.R.C. No. 98-53, 23 *NJPER* 622 (¶28301 1997) (prohibiting direct disability payments beyond those authorized by *N.J.S.A.* 40A:14-154).

Equal Protection and Collective Bargaining

The United States Supreme Court has held that an Ohio law restricting bargaining does not violate the equal protection guarantee of the federal constitution. *Central State Univ. v. AAUP*, __ *U.S.* __, __ *LRRM* __ (3/22/99). The law required public universities to develop standards for professors' instructional workloads and exempted these standards from collective bargaining; the law was a response to a decline in the time professors spent teaching instead of researching. The Ohio Supreme Court believed that the law was irrational because there was no evidence that collective bargaining caused the decline. The United States Supreme Court, however, found that point irrelevant and concluded that the Legislature could rationally decide that a uniform workload policy was required.

Retiree Health Benefits

In *Wood v. Borough of Wildwood Crest*, App. Div. Dkt. No. A-3509-97T2 (4/1/99) (to be published), a police officer retired with 25 years of creditable service, but not actual service, with the employer. Pursuant to a collective bargaining agreement and as promised by several administrators, the employer initially paid the officer's medical benefits, but it discontinued coverage in 1996 when an Appellate Division decision held that 25 years of actual service was required to qualify for this benefit. *Wolfersberger v. Borough of Point Pleasant Beach*, 305 *N.J. Super.* 446 (App. Div. 1996 (aff'd o.b. 152 *N.J.* 40 (1997). The employer then discontinued coverage and, when the officer sued, demanded repayment of $62,772.62 already spent on health benefits. The Court held that the employer was equitably estopped from discontinuing coverage or demanding repayment.